UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	**CRIMINAL NO. 00-21-B-H**
	)	
JOHN H. PICKARD,	)	
	)	
DEFENDANT	)	

ORDER ON DEFENDANT=S MOTION TO SUPPRESS

The Indictment charges the defendant with unlawfully growing marijuana in excess of 1000 plants in violation of 21 U.S.C. '' 841(a)(1), b(1)(A) and 18 U.S.C. ' 2. The defendant has filed a motion to suppress the marijuana plants that were seized pursuant to a State search warrant signed by a State Justice of the Peace. Specifically, the defendant contends that the search warrant was devoid of probable cause because the affidavit in support of the warrant relied on stale information, anonymous informants, and the assertedly questionable claim of a deputy sheriff that he smelled marijuana while standing in the doorway of the defendant=s residence to serve process in an unrelated civil matter. The motion to suppress is **DENIED**.

The Supreme Court stated in Johnson v. United States, 333 U.S. 10, 13 (1948) that "[if] the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to

identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant." At least one Circuit Court of Appeals has held on facts similar to these that the smell of marijuana plants alone can give rise to probable cause. See United States v. Kerr, 876 F.2d 1440, 1444-45 (9th Cir. 1989) (smell of growing marijuana emanating from a shed detached from the residence); cf. United States v. Forbes, 181 F.3d 1, 7 (1st Cir. 1999) (holding that the smell of unburned marijuana and acetone gave probable cause to search unzipped duffle bags in trunk of car). The special agent of the Maine Drug Enforcement Agency who applied for the warrant swore in his affidavit to the distinctive odor of growing marijuana and recounted sufficient experience on the part of the deputy sheriff, who claimed to have smelled the marijuana at the open house door while serving an unrelated civil summons, to support the deputy=s ability to distinguish the smell. The affidavit, together with the Kerr precedent, furnished probable cause for the issuance of the warrant.

To be clear, my Order is predicated on the deputy sheriff=s olfactory observation, not the allegedly stale information (six years old) or the anonymous telephone tips. A magistrate judge may rely upon an anonymous tip when an investigating officer=s observations or knowledge corroborates the tip. See Illinois v. Gates, 462 U.S. 213, 241-46 (1983). Here, however, the anonymous telephone tips to the effect that the defendant grew and sold marijuana at his home did not contain the same detail as anonymous tips have in other "corroboration" cases. Compare Aff. and Request for a Search Warrant at && 4-6, attached to Gov=t Resp.

Br., with Gates, 462 U.S. at 241-46 (anonymous tip "contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted.") I need not address the contention that the material contained in paragraph three of the supporting affidavit is too stale because the government has provided me with adequate contemporary information. See United States v. Scalia, 993 F.2d 984, 986 n. 1 (1st Cir. 1993) (declining to address the "staleness" claim because "the recent information provided by the informant was sufficient to establish probable cause").

Probable cause supported the issuance of the warrant. Alternatively, the good faith exception of United States v. Leon, 468 U.S. 897 (1984), applies, in light of the Kerr precedent.

The motion to suppress is **DENIED**.

SO ORDERED.

DATED THIS 6TH DAY OF JUNE, 2000.

_____

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

U.S. District Court
District of Maine (Bangor)
Criminal Docket for Case #: 00-CR-21-ALL

UNITED STATES OF AMERICA

ATTORNEY

TIMOTHY D. WING, AUSA
ASSISTANT UNITED STATES

P.O. BOX 2460
BANGOR, ME 04402-2460
(207) 945-0344

v.

JOHN H. PICKARD
defendant

J. HILARY BILLINGS
BILLINGS & SILVERSTEIN
P.O. BOX 1445
BANGOR, ME 04402-1445
(207) 941-2356